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No. 04-428

In The
Supreme Court of the United States

JERRY JACKSON STAMPS
and
TERESA LYNN WITT-STAMPS

Petitioners,

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

CASES *Pages*

Chambers v. NASCO, 501 U.S. 32, 111 S.Ct. 2123, 115 L. Ed. 2d 27 (1991) 2

Dailey v. Vought Aircraft Company, 141 F.3d 224, 229 (1998) 3

Ex-parte Bradley, 74 U.S. (7 Wall.) 364, 375, 19 L. Ed. 214 (1868) 2

Goldberg v. Kelly, 397 U.S. 254, 268-69, 90 S. Ct. 1011, 25 L.Ed.2d 267 (1970) 5

Griffin v. Vaughn, 112 F. 3d 703 (3rd Cir. 1997) 8

Greene v. McElroy, et al, 360 U.S. 474 (1959) 2,4,5

In re Gault, 387 U.S. 1, 33, 87 S. Ct. 1428, 1446 18 L.Ed.2d 527 2

In re Medano, 956 F.2d 101, 102 (5th Cir. 1992) 2

In re Stamps, 874 So.2d 113, 2003-2985 (La. 4/14/04) 8

In the Matter of John Ruffalo, Jr., 390 U.S. 544, 88 S. Ct. 1222 (1968) 2,3

Jack Lincoln Shops v. StateDry Cleaners' Bd.
192 Okla. 251, 135 P.2d 332 (1943), appeal
dismissed, 320 U.S. 208, 63 S. Ct. 1448,
87 L. Ed. 1847 (1943) 7

NASCO, Inc. v. Calcasieu Television and Radio, Inc.,
894 F. 2d 696, 706-707 (5th Cir. 1990) 2

Nelson v. Miwa, 56 Haw. 601, 546 P.2d 1005,
12 Fair Empl. Prac. Cas. (BNA) 1017,
11 Emp. Prac. Dec. (CCH) ¶ 10862,
81 A.L.R. 3d 799 (1976) 7

Slochower v. Board of Higher Education of City
of New York, 350 U.S. 551, 76 S. Ct. 637,
100 L. Ed. 692, (1956), reh'g denied, 351 U.S. 944,
76 S.Ct. 843, 100 L. Ed. 1470 (1956) 7

Smith v. Illinois, 390 U.S. 129, 19 L.Ed 2d 956,
88 S. Ct. 748 4

Spevack v. Klein, 385 U.S. 511, 515, 87 S. Ct. 625,
628 17 L.Ed.2d 574 3

Standing Comm on Discipline v. Ross, 735 F. 2d 1168,
1170 (9th Cir. cert. denied, 469 U.S. 1081, 105 S. Ct. 583,
83 L. Ed 2d 694 (1984) 2

Stoner v. Sowders, 997 F.2d 207 (7th Cir. 1993) 4

United States v. Brown, 72 F.3d 25, 29 (5th Cir. 1995) 2

STATUTES

ABA Standards For Imposing Lawyer Sanctions,
Standard 9.3 6

TABLE OF CONTENTS

INTRODUCTION 1

REASONS FOR GRANTING THE WRIT 1

I. THE DECISION OF THE LOUISIANA SUPREME COURT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AS WELL AS THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.. 1

II. PETITIONERS' DUE PROCESS RIGHTS WERE VIOLATED BY RESPONDENTS USE OF DEPOSITION AND VIDEO TESTIMONY WHEN THEY FAILED TO OFFER ANY EVIDENCE THAT THE WITNESSES WERE UNAVAILABLE 3

III. THE RIGHT OF CONFRONTATION OF THE SIXTH AMENDMENT SHOULD APPLY IN DISCIPLINARY CASES 4

IV. FACTORS IN MITIGATION UNDER ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS. STANDARD 9.3 THAT SHOULD APPLY TO ALL DISCIPLINARY CASES ALIKE BUT WERE NOT APPLIED TO THESE PETITIONERS, THUS VIOLATING THE FOURTEENTH AMENDMENT AND EQUAL PROTECTION CLAUSE..... 6

CONCLUSION 9

INTRODUCTION

The decision of the Louisiana Supreme Court should not be allowed to stand because it holds that the Confrontation Clause of the Sixth Amendment does not apply in disciplinary proceedings and that the Code of Evidence is applied in a relaxed fashion.

Respondents Brief in Opposition to the Petition for Writ of Certiorari demonstrates why the Petition should be granted because it clearly identifies the critical issues and rights at stake and illustrates the need for this Court to address the application of Due Process and the Equal Protection Clause to disciplinary proceedings.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE LOUISIANA SUPREME COURT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AS WELL AS THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners ask this Court to address the application of the Confrontation Clause of the Sixth Amendment to attorney disciplinary proceedings and the application of the Code of Evidence necessary to meet the clear and convincing standard in disciplinary proceedings.

Respondents argue that the Louisiana Supreme Court's decision "does not conflict with any decision of this Court."[1]

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[1] Opposition Brief, p. 3, 4, 5, 18

Over and over again Respondents argue that attorney disciplinary proceedings are *sui generis,* not criminal in nature, therefore the Confrontation Clause of the Sixth Amendment does not apply. [2]

This Court has ruled in *In re Ruffalo*, 390 U.S. 544, 551 (1968) that disbarment proceedings "are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault*, 387 U.S. 1, 33, 87 S. Ct. 1428, 1446, 18 L.Ed.2d 527." Also see *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995); *In re Medano*, 956 F.2d 101, 102 (5th Cir. 1992). As such, an attorney is entitled to procedural due process which includes notice and an opportunity to be heard in disbarment or suspension proceedings. *Ruffalo*, 390 U.S. at 550, 88 S. Ct. at 1225-26; *Ex-parte Bradley*, 74 U.S. (7 Wall.) 364, 375, 19 L. Ed. 214 (1868); *Medano*, 956 F.2d at 102; *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 706-707 (5th Cir. 1990), *aff'd sub nom., Chambers v. NASCO*, 501 U.S. 32, 111 S.Ct. 2123, 115 L. Ed. 2d 27 (1991); see also *Standing Comm. On Discipline v. Ross*, 735 F.2d 1168, 1170 (9th Cir. *cert. denied*, 469 U.S. 1081, 105 S. Ct. 583, 83 L.Ed.2d 694 (1984).

Contrary to Respondents' position[3] this Court has also held that the "right of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative and regulatory actions are under scrutiny." *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400 (1959). Respondents further inform this Court that attorney disciplinary proceedings "are not criminal because punishment of an attorney is not the goal" and as such "the Confrontation Clause is inapplicable and the Code of Evidence is applied in a relaxed fashion."[4] Yet Respondents

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[2] Opposition Brief, pp. 3, 4, 5, 14, 15, 16, 17.

[3] See Opposition Brief, p. 4.

[4] See Opposition Brief, p. 5.

state that disciplinary proceedings are "punishable in each state with sanctions. These sanctions range from suspension all the way to disbarment."[5] This policy and position of Respondent is in direct conflict with the holdings of this Court, in *Ruffalo*, 390 U.S. at 550 and *Spevack v. Klein,* 385 U.S. 511, 515, 87 S. Ct. 625, 628 17 L.Ed.2d 574. Judge Dennis of the United States Court of Appeal for the Fifth Circuit explained in *Dailey v. Vought Aircraft Company*, 141 F.3d 224, 229 (1998) that "'[a]lthough disbarment is intended to protect the public, it is a "punishment or penalty imposed on the lawyer.' *In re Ruffalo,* 390 U.S. 544, 550, 88 S.Ct. 1222, 12225-26, 20 L.Ed.2d 117 (1968)."

Petitioners were required to give sworn statements prior to any formal charges being made against them and were not apprised of the charges against them or that disbarment was even a possibility before giving these statements, all in violation of due process.

II. PETITIONERS' DUE PROCESS RIGHTS WERE VIOLATED BY RESPONDENTS' USE OF DEPOSITION AND VIDEO TESTIMONY WHEN THEY FAILED TO OFFER ANY EVIDENCE THAT THE WITNESSES WERE UNAVAILABLE

Respondents argue in their Opposition Brief, for the first time, that "the unavailability of the witnesses as being beyond the subpoena power of the Office of Disciplinary Counsel made the use of the depositions necessary."[6] At no time during any of the proceedings did Disciplinary Counsel present any evidence as to the unavailability of any of the witnesses in this case, as required to meet the minimum requirements of due process.

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[5] Opposition Brief, p. 12

[6] Opposition Brief, p. 5.

This Court made clear in *Smith v. State of Illinois*, 390 U.S. 129 (1968) that the Sixth Amendment right of confrontation is a "fundamental right made obligatory on states by Fourteenth Amendment. U.S.C.A. Const. Amends. 6, 14" and "[p]rejudice ensues from denial of opportunity to place witness in his proper setting and put weight of his testimony and his credibility to a test, without which jury cannot fairly appraise them."

In *Stoner v. Sowders*, 997 F.2d 209 (1993) the Court held that a "witness must be unavailable before admission of **deposition testimony** in lieu of live **testimony** will satisfy **confrontation clause.**" When the government claims a witness is unavailable, the "trial court must make case-specific finding of necessity before admission of the deposition testimony in order to satisfy the confrontation clause" of the Sixth Amendment. *Stoner* 997 F.2d at 213.

III. THE RIGHT OF CONFRONTATION OF THE SIXTH AMENDMENT SHOULD APPLY IN DISCIPLINARY CASES

Attorney disciplinary proceedings, especially disbarment cases, involve fundamental rights therefore, the confrontation clause should apply. Chief Justice Warren of this Court held in *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400 (1959) that:

> Right of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative and regulatory actions are under scrutiny.

Also see *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S. Ct. 1011, 25 L.Ed.2d 267 (1970).

Respondents use of deposition and video testimony in these proceedings included exhibits which were never offered into evidence other than by merely being attached to the back of the deposition when submitted to the Hearing Committee by the Office of Disciplinary Counsel. Petitioners were never afforded the opportunity to confront or cross-examine any of the witnesses about the documents, since they were not offered at the taking of the deposition. Respondents use of these non-admitted documents and the Louisiana Supreme Court's total reliance upon those documents, which constituted inadmissible hearsay and compounded hearsay is a policy and procedure in direct violation of due process and the confrontation clause.

As in *Greene*, Petitioners' rights have been severely compromised and violated on the basis of a fact determination rendered after a hearing which failed to comport with traditional ideas of fair procedure. Respondents state in their Opposition Brief that:

> As Respondent explained *supra*, the disciplinary proceedings under Rule XIX provide for the introduction of evidence not necessarily admissible under a strict application of the Rules of Evidence. Based upon that relaxed standard, Respondent asserts the Louisiana Supreme Court, in its role as trier of fact in this matter, had the right to consider documentary evidence accumulated and submitted by the North Carolina Disciplinary Board in connection with Mr. Locklear's disbarment proceeding. Opposition Brief p. 19

Petitioners did not participate in any way in the formal proceedings in North Carolina, and did not have an opportunity to confront and cross examine any of the witnesses in the proceeding in the North Carolina case against Mr. Locklear.

The admission of this evidence has totally prejudiced the disciplinary proceedings and constitutes a violation of the Sixth Amendment, which is evident from the decision rendered by the Louisiana Supreme Court.

IV. FACTORS IN MITIGATION UNDER ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS. STANDARD 9.3 THAT SHOULD APPLY TO ALL DISCIPLINARY CASES ALIKE BUT WERE NOT APPLIED TO THESE PETITIONERS, THUS VIOLATING THE FOURTEENTH AMENDMENT AND EQUAL PROTECTION CLAUSE

In their Opposition Brief Respondents made numerous references as to the "age" or "maturity" of these Petitioners, even specifically listing the ages in note 79, page 27 of their Opposition Brief, as a means of justification for the Louisiana Supreme Court not applying the mitigation factors which were to be considered under ABA Standards for Imposing Lawyer Sanctions, Standard 9.3.

Respondents point out that Petitioners were also older students. Petitioners submit that they were beyond the traditional age when they both attended Duke and graduated from Yale and Temple Law School, with impeccable academic credentials. Petitioners have led exemplary lives with no problems whatsoever but for the accusations of the Louisiana Office of Disciplinary Counsel while waiting to

take the bar exam for a second time, i.e., November 1998 to February 1999.

Contrary to Respondents assertion, Petitioners are being treated differently, in violation of the Equal Protection Clause. In each and every attorney disciplinary case involving a false bar application, an outside independent body had made a prior determination of wrong-doing which the applicant KNEW existed. Then that applicant intentionally failed to disclose the specific wrong-doing on his or her bar application. Uniquely, in this case the Louisiana Supreme Court makes its own determination of Petitioners' wrong-doing retroactively, and then punishes Petitioners for that action, by disbarment under Rule 8.1.

Classification on the basis of age, in the context of employment generally, "is considered an inherently invidious category, and will be struck down if not reasonably related to a state interest and if totally arbitrary." *Nelson v. Miwa,* 56 Haw. 601, 546 P.2d 1005, 12 Fair Empl. Prac. Cas. (BNA) 1017, 11 Empl. Prac. Dec. (CCH) ¶ 10862, 81 A.L.R. 3d 799 (1976).

Protection from arbitrary action is the essence of substantive due process. *Slochower v. Board of Higher Education of City of New York*, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692, (1956), reh'g denied, 351 U.S. 944, 76 S.Ct. 843, 100 L. Ed. 1470 (1956); *Jack Lincoln Shops v. State Dry Cleansers' Bd.* 192 Okla. 251, 135 P.2d 332 (1943), appeal dismissed, 320 U.S. 208, 63 S. Ct. 1448, 87 L. Ed. 1847 (1943).

A claim that person is entitled to "substantive due process" means that state action which deprives him or her of life, liberty, or property must have a rational basis; the reason for the deprivation may not be so inadequate that the

judiciary will characterize it as "arbitrary." To satisfy the requirements of the Due Process Clause, laws and regulations MUST provide specific standards which avoid arbitrary and discriminatory enforcement. *Griffin v. Vaughn*, 112 F. 3d 703 (3rd Cir. 1997).

Respondents ironically cite the present case,[7] *In re Stamps*, 874 So. 2d 113 (La. 2004) as the authority which allows them to ignore due process and the confrontation clause and to provide "the Louisiana Supreme Court with exclusive and plenary power to define and regulate all facets of the practice of law, including bar admission of attorneys to the Bar, in Louisiana."[8]

CONCLUSION

For the reasons expressed, the proceedings against these Petitioners lacked the fundamental fairness required by the rules and the Fourteenth Amendment to the U.S. Constitution. This Court should grant Petitioners' writ of certiorari. Since the rendering of the opinion in this case, the Louisiana Office of Disciplinary Counsel, has cited the Stamps' case as the controlling authority on evidentiary issues in disciplinary proceedings wherein *everything is in and nothing is excluded* (including all hearsay evidence). The current decision in this case will have overwhelming consequences for all attorneys and will serve to render the Rules of Evidence, the Rules of Professional Conduct and the recent decisions by this Court meaningless in regard to disciplinary matters. Petitioners ask this Court to address the application of the Confrontation Clause of the Sixth Amendment to disciplinary proceedings and the application of the Code of Evidence necessary to meet the clear and convincing standard in disciplinary proceedings.

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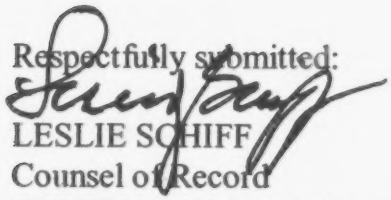
[7]Opposition Brief, pp. 10, 11, 12, 23.
[8] Opposition Brief, p. 10.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing Reply Brief in Support of Petition for Writ of Certiorari have this day been forwarded by United States Mail to Ms. Sonia Mallett, Louisiana Department of Justice, Litigation Division, 1885 N. 3rd Street-Third Floor, P.O. Box 94005, Baton Rouge, Louisiana 70804-9005 and to Mr. G. Fred Ours, Deputy Disciplinary Counsel, Office of Disciplinary Counsel, 4000 S. Sherwood Forest Blvd., Suite 607, Baton Rouge, Louisiana 70816, post prepaid and properly addressed.

Opelousas, Louisiana, this 11th day of September, 2004.

LESLIE J. SCHIFF